



2002718



"Nehring, Pamela"
<Pamela.Nehring@bnsf
.com>

To: Richard Sisk/ENF/R8/USEPA/US@EPA
cc:
Subject: Final AOC for Libby

10/30/02 03:23 PM

Per my voicemail to you, here are some additional thoughts. We would be ready to execute the AOC if these changes were made, but would like your comment on them. Please give me a call to discuss. Thanks!

Pamela Nehring
Senior General Attorney
817/352-3469

CONFIDENTIALITY NOTICE: The information contained in this e-mail communication and any attached documentation may be privileged, confidential or otherwise protected from disclosure and is intended only for the use of the designated recipient(s). It is not intended for transmission to, or receipt by, any unauthorized person. The use, distribution, transmittal or re-transmittal by an unintended recipient of this communication is strictly prohibited without our express approval in writing or by e-mail. If you are not the intended recipient of this e-mail, please delete it from your system without copying it and notify the above sender so that our e-mail address may be corrected. Receipt by anyone other than the intended recipient is not a waiver of any attorney-client or work-product privilege.

-----Original Message-----

From: sisk.richard@epamail.epa.gov [mailto:sisk.richard@epamail.epa.gov]
Sent: Tuesday, October 29, 2002 6:13 PM
To: Nehring, Pamela
Subject: RE: Final AOC for Minot

Pam - I realized that I had redrafted the language we spoke about concerning Libby in my redraft dated 10/18. So I am sending that draft to you by e-mail with most everything completed except for the effective date paragraph. I intend to have my folks look at this Libby AOC

tomorrow and I will let you know what they say. What do you think of the language in Paragraph 4?

Also, concerning Minot, I did not get the signature page in the overnight mail today, but I will do it tomorrow. Also, if any of my reviewers or signers have substantive comments, I asked them to get me those comments by Friday. Hopefully, there will be no comments that require further delays in the work.

(See attached file: BN Libby AOC 2-2.wpd)

Richard Sisk

"Nehring, Pamela"
<Pamela.Nehring@b To: Richard Sisk/ENF/R8/USEPA/US@EPA
nsf.com> cc:
Subject: RE: Final AOC for Minot
10/29/02 02:10 PM

Thanks! Any word on Libby?

Pamela Nehring
Senior General Attorney
817/352-3469

CONFIDENTIALITY NOTICE: The information contained in this e-mail communication and any attached documentation may be privileged, confidential or otherwise protected from disclosure and is intended only

for the use of the designated recipient(s). It is not intended for transmission to, or receipt by, any unauthorized person. The use, distribution, transmittal or re-transmittal by an unintended recipient of this communication is strictly prohibited without our express approval in writing or by e-mail. If you are not the intended recipient

of this e-mail, please delete it from your system without copying it and

notify the above sender so that our e-mail address may be corrected.

Receipt by anyone other than the intended recipient is not a waiver of any attorney-client or work-product privilege.

-----Original Message-----

From: sisk.richard@epamail.epa.gov [<mailto:sisk.richard@epamail.epa.gov>]

Sent: Tuesday, October 29, 2002 2:25 PM

To: Pamela.Nehring@BNSF.COM

Subject: Final AOC for Minot

Pam - Enclosed is the final AOC for Minot. I received the okay to make the effective date November 4th, as you suggested. With luck, we can get all the signatures by this Friday.

I spoke with Joyce on the perimeter air monitoring issue and she said for this project that is fine.

Let me know if the signature line is okay.

(See attached file: bn removal aoc minot final ver.wpd)

Richard Sisk



Libby Word Perfect Version.

I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Order on Consent ("Order") is entered into voluntarily by the United States Environmental Protection Agency ("EPA") and The Burlington Northern and Santa Fe Railway Company ("Respondent"). This Order provides for the performance of a removal action by Respondent and the reimbursement of certain response costs incurred by the United States at or in connection with the Respondent's property comprising the Libby rail yard in Libby, Montana (the "Property").

2. This Order is issued under the authority vested in the President of the United States by Sections 104, 106(a), 107 and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606(a), 9607 and 9622, as amended ("CERCLA").

3. EPA has notified the State of Montana (the "State") of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

4. EPA and Respondent recognize that this Order has been negotiated in good faith and that the actions undertaken by Respondent in accordance with this Order do not constitute an admission of any liability. Respondent has raised defenses to the assertions of liability, which are being considered by EPA. Nevertheless, Respondent is agreeing to proceed with the Work under this Order due to weather constraints with respect to the timing of the Work and in consideration of EPA's acknowledgment that the Work conducted pursuant to this Order and Future Response Costs reimbursed pursuant to this Order may be used as consideration, in whole or in part, towards a future de minimis or other settlement of Respondent's potential liability for the Libby Asbestos site Site (as listed October 23, 2002 on the National Priorities List) generally. Respondent does not admit, and retains the right to assert any defenses and controvert in any subsequent proceedings, other than proceedings to implement or enforce this Order, the validity of the findings of facts, conclusions of law, and determinations in Sections IV and V of this Order. Respondent agrees to comply with and be bound by the terms of this Order and further agrees that it will not contest the basis or validity of this Order or its terms.

318893.2
318893.2
318893.2
318893.2
318893.2
318893.2
318893.2

II. PARTIES BOUND

5. This Order applies to and is binding upon EPA and upon Respondent and its successors and assigns. Any change in ownership or corporate status of Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter Respondent's responsibilities under this Order.

6. Respondent shall ensure that its contractors, subcontractors, and representatives receive a copy of this Order and comply with this Order. Respondent shall be responsible for any noncompliance with this Order.

III. DEFINITIONS

9. Vermiculite mining at Zonolite Mountain (the "mine") was commenced by the Universal Zonolite Company in the 1920s. In 1963, W.R. Grace purchased Zonolite mountain and continued operations until 1990. The processed ore was trucked down the Rainy Creek Road to a Screening Plant, which separated the milled ore into various sizes. Subsequently, the screened ore was moved by conveyor belt across the Kootenai River to a loading facility owned and operated by W.R. Grace, where it was loaded by W.R. Grace employees into rail cars and shipped either to the W.R. Grace Export/Expansion Plant (Libby) or across the country by rail.

10. Sampling shows that asbestos, a hazardous substance, is present in soil, raw ore, ore-concentrate and other soil-like materials at various locations in and around the community of Libby including the Site. The potential harm caused by the asbestos on the Site is geographically divisible from the potential harm caused by asbestos off the Site. Visible unexpanded vermiculite has been found along Respondent's tracks and rail yard in Libby. All vermiculate found on the Property originated from W.R. Grace's mine on Zonolite mountain

11. The Acting Assistant Administrator, Office of Solid Waste and Emergency Response has determined that the presence of the asbestos at the Site may present an imminent and substantial endangerment in the Action Memorandum.

12. Respondent owns The Burlington Northern and Santa Fe Railway Company rail yard, herein referred to as the Property. Respondent recently implemented its own investigations regarding asbestos. A total of twenty-two surface soil samples collected in November, 2001 by Respondent along the railroad tracks and its railyard ranged from trace to less than 1% fibrous

318893.2
318893.2
318893.2
318893.2
318893.2
318893.2
318893.2

amphibole asbestos by weight. In addition, visible unexpanded vermiculite remained at Track #1, Track #2 and Track #3.

V. CONCLUSIONS OF LAW AND DETERMINATIONS

13. Based on the Findings of Fact set forth above, and the Administrative Record supporting this removal action, EPA has determined that:

- a. The Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
- b. The contamination found at the Site, as identified in the Findings of Fact above, includes a "hazardous substance" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).
- c. Respondent is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
- d. Respondent is a responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is ~~jointly and severally~~ liable for performance of response actions and for response costs incurred and to be incurred at the Site.
 - i. Respondent is the "owner" and/or "operator" of ~~a portion of the~~ Site, which is a facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).
 - ii. Respondent was the "owner" and/or "operator" of ~~a portion of the~~ Site, which is a facility at the time of disposal of hazardous substances at the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).
- e. The conditions described in the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from a facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

318893.2
318893.2
318893.2
318893.2
318893.2
318893.2
318893.2

f. The removal action required by this Order is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Order, will be considered consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

VI. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for this Site, it is hereby Ordered that Respondent shall comply with all provisions of this Order, including, but not limited to, all attachments to this Order and all documents incorporated by reference into this Order. The Respondent agrees to comply with all provisions of this Order.

VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR, AND ON-SCENE COORDINATOR

14. Respondent shall perform the removal action or retain one or more contractors to perform the Work and shall notify EPA of the name(s) and qualifications of such contractor(s) within 5 days of the Effective Date. Respondent shall also notify EPA of the name(s) and qualification(s) of any other contractor(s) or subcontractor(s) retained to perform the Work at least 5 days prior to commencement of such Work. EPA retains the right to disapprove of any or all of the contractors and/or subcontractors retained by Respondent. If EPA disapproves of a selected contractor, Respondent shall retain a different contractor and shall notify EPA of that contractor's name and qualifications within 10 days of EPA's disapproval.

15. Within 5 days after the Effective Date, Respondent shall designate a Project Coordinator who shall be responsible for administration of all actions by Respondent required by this Order and shall submit to EPA the designated Project Coordinator's name, address, telephone number, and qualifications. To the greatest extent possible, the Project Coordinator shall be present on Site or readily available during Site work. EPA retains the right to disapprove of the designated Project Coordinator. If EPA disapproves of the designated Project

58. If Respondent fails to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Respondent shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 54. Nothing in this Order shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this Order or of the statutes and regulations upon which it is based, including, but not

318893.2
318893.2
318893.2
318893.2
318893.2
318893.2
318893.2

limited to, penalties pursuant to Sections 106(b) and 122(I) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(I), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) or 122(I) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this Order or in the event that EPA assumes performance of a portion or all of the Work pursuant to Section XX, Paragraph 62. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Order.

XIX. COVENANT NOT TO SUE BY EPA

59. In consideration of the actions that will be performed and the payments that will be made by Respondent under the terms of this Order, and except as otherwise specifically provided in this Order, EPA covenants not to sue or to take administrative action against Respondent pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for performance of the Work and for recovery of Future Response Costs [with respect to the Site and for the Mine and the Libby Asbestos Site generally.] This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the complete and satisfactory performance by Respondent of all obligations under this Order, including, but not limited to, payment of Future Response Costs pursuant to Section XV. This covenant not to sue extends only to Respondent and does not extend to any other person.

XX. RESERVATIONS OF RIGHTS BY EPA

318893.2
318893.2
318893.2
318893.2
318893.2
318893.2
318893.2

60. Except as specifically provided in this Order, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Order, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondent in the future to perform additional activities pursuant to CERCLA or any other applicable law, [except that EPA shall not name Respondent as a responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), for any off-Site contamination or any off-Site response actions based on a finding the Respondent is or was the "owner" or "operator" of the Site.]

61. The covenant not to sue set forth in Section XIX above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Order is without prejudice to, all rights against Respondent with respect to all other matters, including, but not limited to:

- a. claims based on a failure by Respondent to meet a requirement of this Order;
- b. liability for costs not included within the definition of Future Response Costs;
- c. liability for performance of response action other than the Work;
- d. criminal liability;
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- f. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site [provided such liability is not alleged to be based on a finding that Respondent is or was the "owner" or "operator" of the Site] and liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site.

318893.2
318893.2
318893.2
318893.2
318893.2
318893.2
318893.2

liability for the Mine and Libby Asbestos Site generally to the extent based on new information not known or available to EPA as of the Effective Date of this Order.

318893.2
318893.2
318893.2
318893.2
318893.2
318893.2
318893.2